LIBRARY
SUPREME COURT U. S.

No. 770

Office-Supreme Court, U.S.
FILED
JAN 15 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHICAGO, ROCK ISLAND & PACIFIC R. CO., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court
for the Eastern District of Missouri—Eastern Division

MOTION TO AFFIRM

NUEL D. BELNAP
One North LaSalle Street
Chicago, Illinois, 60602

Counsel for Federal Barge Lines, Inc., and American Commercial Barge Line Co., Appellees

BELNAP, SPENCER, HARDY & FREEMAN
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO 12, ILL. LAbrview 5-6581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 770

CHICAGO, ROCK ISLAND & PACIFIC R. CO., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court
for the Eastern District of Missouri—Eastern Division

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Federal Barge Lines, Inc., and American Commercial Barge Line Company move that the judgment of the district court be affirmed.

STATEMENT.

This is a direct appeal from the final judgment of a three-judge district court which dismissed appellants' complaint seeking to set aside orders of the Interstate Commerce Commission. Movants were intervening defendants in the lower court.

The challenged orders of the Commission were entered in a formal complaint proceeding, I.C.C. Docket No. 30744, brought by Federal Barge Lines, Inc., and American Barge Line Company (American Commercial Barge Line Company successor), together with Arrow Transportation Company. These are certificated common carriers by water subject to part III of the Interstate Commerce Act.[1] They complained on the ground that in respect to certain movements of ex-barge grain and grain products in southeastern and southwestern territories the charges demanded and received by railroads were in excess of the compensation accepted by the same railroads when transporting all-rail grain and grain products from and to the same points. This disparity in rate treatment was alleged to constitute discrimination prohibited by sections 2 and 3(4) of the Interstate Commerce Act. 49 U.S.C. §§ 2, 3(4).[2]

The particular discrimination involved in the instant case is akin to that which this Court found unlawful in

---

[1] See *Federal Barge Lines, Inc., Purchase, etc.*, 285 I.C.C. 439, 440, 448 (1953) and cases cited; *American Barge Line Company Applications*, 260 I.C.C. 783, 784, 791 (1946) and case cited; *Arrow Transp. Co. Application*, 250 I.C.C. 599 (1942) and *Tennessee Valley S. & G. Co.*, 265 I.C.C. 5 (1946), Arrow Transportation Co. having been substituted as applicant in the case last cited.

[2] J.S. at 13-14 reproduces these provisions.

Interstate Commerce Commission v. *Mechling*, 330 U.S. 567 (1947); *James McWilliams Blue Line* v. *United States*, 100 F.Supp. 66 (S.D.N.Y. 1951), *aff'd*, 342 U.S. 951 (1952) and *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56 (1956). The discrimination here was accomplished through the medium of railroad divisions[3] of through all-rail rates less than flat rates[4] assessed on ex-barge grain moving over the same railroad from and to the same points.

In its first three reports in I.C.C. Docket No. 30744[5] the Commission ruled in one form or another that unlawful or unjust discrimination does not result when a division of a through all-rail rate on grain is lower than the flat rate on ex-barge grain for a corresponding haul.[6] In *Arrow Transp. Co.* v. *United States*, 176 F.Supp. 411 (N.D. Ala. 1959), *aff'd sub nom. State Corp. Comm'n of Kansas* v. *Arrow Transp Co.*, 361 U.S. 353 (1960), this ruling of the Commission was held contrary to law, the court saying:

---

[3] A division is the amount which is allotted among connecting carriers by agreement out of a single-factor, joint through rate to cover a specified portion of the through haul performed by a particular connecting line in the through route.

[4] Flat rates are published from specific origins to specific destinations and apply regardless of either prior or subsequent transportation.

[5] Docket 30744, *American Barge Line Co., et al.* v. *Alabama G. S. R. Co., et al.*, 296 I.C.C. 247 (1955), 303 I.C.C. 463 (1958), and 306 I.C.C. 167 (1959).

[6] In its third report the Commission did find that unlawful discrimination in violation of §3(4) results from a separately published rate factor (reshipping on proportional rate) on ex-rail grain when lower than a flat rate on ex-barge grain for a corresponding haul. The Commission's order requiring the railroads to cure this discrimination was sustained in *Atchison T. & S. Fe Ry. Co.* v. *United States*, 194 F. Supp. 438 (D. Kan., 1961) which was not appealed.

> It is immaterial to the question of discrimination whether the compensation a carrier receives on ex-rail traffic is in the form of a separately established proportional rate, or a division of a through rate. In either event the yardstick for measuring discrimination against ex-barge traffic is the compensation received by the outbound rail carrier on ex-rail traffic from the same port to the same destination. * * * We simply hold * * * that the divisions received on ex-rail movements are *prima facie* evidence as to what charge should be assessed upon ex-barge movements.[10] [176 F.Supp. at 419]
>
> [10]The Supreme Court in Mechling held that a showing of additional costs on ex-barge traffic was necessary to justify a differential between ex-barge and ex-rail charges. The railroads submitted cost evidence in this proceeding in an attempt to justify such a differential but the Commission rejected this evidence. See also *Tennessee Valley Authority* v. *United States* D.C.N.D. Ala. 1951, 96 F. Supp. 409. [176 F.Supp. at 419]

Upon remand, the Commission reopened Docket No. 30744 to receive (1) evidence with respect to all-rail divisions on grain and grain products received by railroads from barge unloading ports, including Memphis, Tennessee and New Orleans, Louisiana, and (2) evidence relevant to whether and to what extent such divisions should determine the rail rates from such ports on ex-barge traffic. After hearings the Commission issued its fourth report, 316 I.C.C. 759 (1962), which is a part of the orders here challenged.

In that report the Commission found that complainants had made out a *prima facie* case of discrimination which is illustrated by the following examples: From Memphis,

Tenn., to Little Rock, Ark., flat rates on ex-barge traffic of 28.5 cents on coarse grains and 37.5 cents on other grains versus divisions from and to the same points of all-rail rates which ranged from 8.6 cents to 16 cents, dependent on origin and kind of grain (316 I.C.C. at 766); from New Orleans, La., to destinations on the Texas & Pacific and Texas & New Orleans railroads, flat rates on ex-barge grain ranging from 35 to 37.5 cents versus corresponding divisions on all-rail grain ranging from 13.3 to 20.9 cents (316 I.C.C. at 767). The Commission further found that the defendant railroads had not established a cost justification for flat rates on ex-barge grain higher than the corresponding divisions on all-rail grain (316 I.C.C. at 770); that, absent a demonstrated cost differential, a rail carrier from a port is entitled to no more compensation on ex-barge traffic than it obtains on ex-rail traffic from the same origin moving from transit at the port to the same destination (316 I.C.C. at 771); that the defendants had not overcome by their evidence the *prima facie* case of discrimination illustrated by the examples given above (316 I.C.C. at 773); and that the railroads could employ any method to eliminate the discrimination found, so long as they treated ex-barge grain, as nearly as practicable "in the same manner ratewise as ex-rail grain" (316 I.C.C. 773).

The Commission's ultimate conclusions and orders proscribed unlawful discrimination "against connecting common carriers by water subject to part III" in violation of section 3(4) and also unjust discrimination in violation of section 2 against shippers whose grain and grain products reached the ports by for-hire barge transportation. (J.S. 32, 34-35).

The challenged orders became effective before this case was heard on its merits in the lower court. The railroads elected to comply with the Commission's orders by cancelling the joint rates via the ports on all-rail grain. As a result, the equality in rate treatment of ex-barge and all-rail grain required by the orders is now accomplished by applying the higher flat rates to each type of traffic.

The district court, in sustaining the Commission's order, held that the Commission had not misconstrued the governing statute and had correctly followed the construction of the law set forth in *Arrow*. (J.S. 23-24, 25-26). It further held that there is no basis, statutory or constitutional, for distinguishing between the application of the Commission's order to regulated and unregulated[7] grain. (J.S. 25.) On the question of whether the Commission's findings and orders are supported by or contrary to the evidence, the district court said:

> "A reading of the record before the Commission leads to the conclusion that the findings are supported by the record. The Court does not find error in the Commission's findings that a cost differential for transited ex-rail and ex-barge grain for reshipment from the ports was unsubstantiated." [J.S. 28]

The railroad appeal charges error in these holdings of the district court.

---

[7] Grain in bulk transported by water is unregulated when moved in a tow containing not more than three bulk commodities, whether transported by a certificated or non-certificated water carrier. Section 303(b) (49 U.S.C. 903(b)).

ARGUMENT.

This motion deals only with those questions which relate to discrimination in rates and charges by railroads against connecting common carriers by water subject to part III of the Interstate Commerce Act, such discrimination being prohibited by section 3(4) of the Act. The fact that the parties to this motion are common carriers by water subject to part III gives them full protection against the discrimination prohibited by that section, even if the grain were to move in a tow exempt from regulation under section 303(b) of the Interstate Commerce Act (49 U.S.C. § 903(b)) by reason of the consist of that tow.[8] Consequently, the parties to this motion are not concerned, as are carriers by water not certificated under part III of the Interstate Commerce Act, with questions which relate to the Commission's findings and orders directed to unjust discrimination against shippers in violation of section 2.

1. *Mechling* gave recognition to the right of interstate water carriers to demand from the railroads with which they connect complete equality with connecting rail lines in the matter of rates and charges applied on shipments of bulk grain from the ports to which the water carrier traffic is brought. *Dixie* made it plain that rail carriers cannot, through the device of joint rates and lower divisions with connecting rail lines, evade their statutory obligation to give equal rate treatment to connecting water lines. *Arrow* made it clear that as to this very

[8] The record shows that the volume of total traffic transported by movants is such that, except in rare instances, their tows contain non-bulk commodities and thus do not meet the conditions of exemption in section 303(b) as construed by the Commission.

ex-barge grain traffic the Commission is obliged to find the discrimination unlawful and to require its elimination *unless* railroads bear the burden of proving that flat rates on ex-barge grain higher than divisions on all grain are justified by a difference in cost. The Commission, in obedience to the remand in *Arrow*, treated the disparity between flat rates on ex-barge grain and divisions on all-rail grain as making out a *prima facie* case of discrimination. Upon consideration of all evidence relied upon by the railroads, the Commission categorically found that *prima facie* case had not been overcome. (316 I.C.C. at 773). The district court, upon its reading of the record, agreed. (J.S. 27-28). No further consideration of these matters by this Court is warranted.

2. Appellants claim that this Court has not considered the statutory and constitutional questions involved in treating grain brought to the ports by certificated carriers in exempt tows as entitled to protection under section 3(4). (J.S. 11.) In making this claim appellants overlook that all of the traffic involved in *Mechling, Dixie Carriers,* and *Arrow* was bulk traffic of certificated carriers which moved unregulated whenever the tows in which the traffic was transported met the conditions of exemption set forth in section 303(b). In each of those cases this Court held in unqualified terms that the regulated barge lines were entitled to the protection provided by section 3(4) and in so holding made no differentiation between traffic handled in regulated and traffic handled in exempt tows. It could hardly be otherwise inasmuch as the protection from unlawful discrimination extended by the words Congress added to section 3(4) in 1940[9] runs to "any common carriers by water subject to part III." That protection is not made dependent on the traffic itself being subject to part III, so long as it is transported by a subject carrier.

[9] Sept. 18, 1940, c. 722, Title I § 5(3), 54 Stat. 904.

CONCLUSION.

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

Respectfully submitted

NUEL D. BELNAP
One North LaSalle Street
Chicago, Illinois, 60602

Counsel for Federal Barge Lines Inc., and American Commercial Barge Line Co., Appellees

BELNAP, SPENCER, HARDY & FREEMAN
Of Counsel